Before the
Federal Communications Commission
Washington, DC 20054

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	**CC Docket No. 01-337**
Incumbent LEC Broadband	)	
Telecommunications Services	)	

JOINT COMMENTS OF THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES ("TCCFUI") AND THE CITY OF PLANO, TEXAS ("PLANO")

The Texas Coalition of Cities for Utility Issues ("TCCFUI") is a coalition of approximately 110 Texas cities dedicated to protecting and supporting the interests of the citizens and cities of Texas. TCCFUI is interested in the activities of the Texas Legislature, Public Utility Commission, Railroad Commission and the Federal Communications Commission. TCCFUI also provides franchising expertise and model franchise documents to member cities and ensures that the citizens of Texas continue to enjoy quality utility and cable service.[1]

The City of Plano, Texas ("Plano") is a home-rule city incorporated under the laws of the State of Texas. Plano is an affluent suburban community located approximately 20 miles north of Dallas with approximately 226,500 residents. Pursuant to Year 2000 Census data, the median household income in Plano is $77,558. Plano has been rated Number One in home-based businesses in the nation two consecutive years.

The Texas Coalition of Cities for Utility Issues ("TCCFUI") and the City of Plano, Texas ("Plano") respond to certain elements of specific questions posed in the Commission's Notice of Proposed Rulemaking issued in CC Docket No. 01-337.

I. NPRM DOES NOT MEET THE STATUTORY INTENT OF THE TELECOMMUNICATIONS ACT OF 1996

Generally, TCCFUI and Plano assert that this rulemaking does not meet the statutory intent of the Telecommunications Act of 1996 (“the Act”). This NPRM would remove the incentives that were put in place by the Act for incumbent LECs to open their local exchange markets and ultimately to allow for the creation of competition those markets. Therefore, TCCFUI and Plano maintain that the undertaking of this NPRM is not within the spirit of the Telecommunications Act of 1996 and its attempts to achieve greater levels of competition.

II. MARKET POWER ANALYSIS, ANTI-COMPETITIVE BEHAVIOR AND INTRAMODAL COMPETITION

The Commission has inquired as to the extent to which current statutory and regulatory requirements, including any competitive safeguards, limit the market power of incumbent LECs. In the *Competitive Carrier Fourth Report and Order*, the Commission defined market power as “the ability to raise prices by restricting output,” and as “the ability to raise and maintain prices above the competitive level without driving away so many customers as to make the increase unprofitable.” *See Competitive Carrier Fourth Report and Order,* 95 FCC 2d at 558, para. 7. TCCFUI and Plano assert that current statutory and regulatory requirements have not practically limited the market power of the incumbent LECs and thus the incumbent LECs should not be reclassified as non-dominant carriers with regard to broadband services.

In terms of intramodal competition, the incumbent LECs today control a majority of the facilities that are used to provide broadband services. These facilities are also used to provide local exchange telephone service. In Texas and many other states, intramodal competition exists at least to some extent purely because the incumbent LECs were required under the Telecommunications Act of 1996 to open their local exchange markets to other providers. While Plano consumers have experienced some competition in the local telephone and broadband markets, the majority of the competition has come from resellers that are using SBC and Verizon facilities to provide services. If SBC and Verizon were to be classified as non-dominant carriers for purposes of the broadband market and thus no longer required to provide open access to their facilities, competitive providers would be forced to become facilities-based providers instead of resellers in order to compete for both local exchange telephone service and broadband services. This is not economically feasible for most competitive LECs, which are having great difficulty in obtaining financing due to existing market conditions and the experiences of financial institutions. Reclassifying incumbent LECs as non-dominant carriers for purposes of broadband services would also effectively reduce, if not altogether eliminate, competition for both local exchange and broadband services—a loss for all consumers.[2] The market power of the incumbent LECs found in the local exchange markets will remain in tact in the broadband market due to the control over facilities maintained by the incumbent LECs.

For purposes of an example, Plano provides the following information: The Texas Public Utility Commission has certificated more than 400 competitive LECs. SBC and Verizon currently provide local exchange and DSL service in Plano, and Qwest Communications has begun to build facilities in Plano. In addition to those companies, however, Plano has approximately 48 competitive LECs that provide various services to its residents. Some of the competitive LECs have built their own facilities in Plano, but a greater number are resellers of SBC and Verizon. Deregulation of the incumbent LECs with regard to broadband services would effectively remove the ability of the resellers to operate in Plano not only in the broadband service market but also in the local exchange market and thus would require Plano residents using the services provided by those resellers to obtain the services instead from a facilities-based company (which would more than likely be a Baby Bell). Thus, a new DSL monopoly would be created instead of creating competition and local exchange service competition would be reduced if not eliminated. Therefore, while the incumbent LECs may be non-dominant carriers when reviewing intermodal competition, the incumbent LECs should most certainly be considered dominant carriers in terms of intramodal competition.

TCCFUI's and Plano's concerns over deregulation of broadband service and specifically over classifying the incumbent LECs as non-dominant carriers with regard to broadband service is not merely based on what is expected to happen in the future. Our concerns are based on the past actions of the Baby Bells in engaging in anti-competitive behavior throughout the nation. The Baby Bells have repeatedly violated the Telecommunications Act of 1996 by excluding competitive carriers from access to their systems, and, as a result, have paid $1.84 billion in fines related to this and similar illegal behavior since the Telecommunications Act of 1996 was passed. It is less expensive to pay fines for anti-competitive behavior than it is to allow for competition. Based on past actions of the Baby Bells in particular in the local exchange market, there is no indication that deregulating broadband service will promote competition or encourage deployment of broadband service.

III. CHANGING THE CURRENT REGULATORY ENVIRONMENT WILL NOT ACCELERATE DEPLOYMENT OF BROADBAND SERVICES

TCCFUI and Plano assert that changing the current regulatory environment for incumbent LECs will not accelerate deployment of broadband services. These services remain unavailable to the majority of Americans, regardless of whether they live in urban areas, affluent suburbs, rural areas, or economically depressed or disadvantaged areas. Broadband services are only being deployed by incumbent LECs and a few competitive LECs that utilize the facilities of incumbent LECs. Deployment of broadband services is influenced primarily by the single market factor of capital availability—access to capital and return on investment. When capital was available to the telecommunications markets, deployment rates increased. When access to this capital became limited, deployment rates decreased. The incumbent LECs (specifically the “Baby Bells”) have alleged that they are not receiving a rate of return on their facilities that matches the market rate and thus are being undercompensated for the facilities that are being used by competitive LECs.

The fact of the matter is that the Baby Bells were guaranteed a rate of return for the existing telecommunications infrastructure as a result of the Telecommunications Act of 1996. Through the guaranteed rate of return, the Baby Bells were compensated for any “stranded costs” that they may have incurred as a result of the new competitive market created by the Act. In addition to the guaranteed rate of return, the companies have also been compensated for those same facilities by competitive LECs that resell

Baby Bell facilities. Thus, the Baby Bells have been doubly compensated for the facilities. However, instead of using the compensation generated by the guaranteed rate of return and the profits generated from resold facilities to upgrade their facilities in order to provide broadband services to consumers, the Baby Bells appear to have used such compensation for the purpose of engaging in anti-competitive behavior, challenging the authority of state and local governments to manage public rights-of-way, questioning the scope and intent of the Act, and lobbying for legislative and regulatory action to remove the requirements imposed upon them by the Act. TCCFUI and Plano assert that, if the incumbent LECs had complied (and would now comply) with the Telecommunications Act of 1996 and current FCC regulations instead of fighting them, broadband services would be deployed today to the majority of Americans.

IV. REDUCED REGULATION OF SERVICES PROVIDED BY INCUMBENT LECs WILL IMPEDE COMPETITION IN BOTH THE LOCAL EXCHANGE AND BROADBAND MARKETS AND INHIBIT THE DEPLOYMENT OF BROADBAND SERVICES [SECTION IV(C) OF NPRM]

In Sections 39 and 46, the Commission seeks comments concerning whether reduced regulation of services provided by incumbent LECs will foster competition and the deployment of broadband facilities and whether existing regulation inhibits or stimulates the deployment of broadband services. TCCFUI and Plano assert that reduction of regulation of services provided by incumbent LECs is not what is needed to foster competition and the deployment of broadband facilities and services. Reduced regulation of incumbent LECs will reduce, if not completely eliminate, existing competition in the local exchange and broadband markets and promote broadband deployment only through a new broadband monopoly. As a practical matter, there is very limited customer interest and a glut of facilities owned by both incumbent LECs and competitive LECs existing in public rights-of-way. The proposal will only worsen this situation and will not promote effective competition.

TCCFUI and Plano direct the Commission's attention to Jim Wagner's article "BellSouth: A DSL Success Story"[3] concerning BellSouth's success in deploying broadband services to its markets. In the article, BellSouth, an incumbent LEC, touts its success in deploying broadband service under the current regulatory environment. BellSouth announced "it has nearly tripled its DSL customer base with 620,500 customers . . . which represents a growth rate of 188 percent, the highest of any DSL or cable provider in the country." The company further stated, "(This) success . . . is largely due to BellSouth's focus on customer service and its execution of the most aggressive DSL deployment strategy in the industry, increasing the company's potential customer base from 45 percent to 70 percent of households in the markets that BellSouth serves." A similar article on BellSouth's success has been written by Wayne Kawamoto with CLEC-Planet.[4] BellSouth's success story clearly shows that broadband deployment can be achieved without changes to the current regulatory environment and without reclassifying the incumbent LECs as non-dominant carriers in the provision of broadband services. Thus, there is no reason to change the existing regulatory requirements.

In Paragraph 39 of the NPRM, the Commission states that "[e]ven in situations where a fully competitive market has not yet been realized, deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce prices and offer consumers greater choice." These types of results have not been found in the local exchange market. According to a report issued by the Consumers Union on February 6, 2002, "local telephone charges have increased 17 percent since the Telecommunications Act became law."[5] TCCFUI has observed throughout Texas cities and Plano has experienced that consumers have endured increases in rates and an unwillingness by the incumbent LECs to address consumers' needs for broadband services even though consumers are willing to pay the high monthly rate for these services. In essence, the incumbent LECs that dominate the facilities needed to provide broadband services to consumers have held consumers hostage in order to seek freedom from the restrictions placed on them by the Telecommunications Act of 1996 and the regulations imposed by the Commission through rulemakings such as this and through legislation such as HR 1542.

Consumers are also being held hostage due to the fact that the incumbent LECs are not trying to deploy to residential customers because the companies have indicated that it is not "economically beneficial" to them to do so. This response has been given on numerous occasions to Plano officials and administrators, even though there are hundreds of Plano residents that have indicated a willingness to pay the high prices for DSL/broadband services set by the incumbent LECs. The incumbent LECs are cherry-picking only business customers for the provision of DSL/broadband service. This is definitely the case in Plano with SBC and Verizon and in other Texas cities.

Paragraph 42 of the NPRM states: "We also ask parties to comment on whether incumbent LECs should be reclassified as non-dominant in the provision of broadband services." TCCFUI, and Plano assert that it is not possible to reclassify the incumbent

LECs as non-dominant in the provision of broadband services while maintaining dominant classification for local exchange telephone service when those services are provided over the same facilities. In order to proceed with such a reclassification, the Commission would have to be able to distinguish between voice and data services. Voice and data information are increasingly transmitted on the telephone network in digitized form creating a seamless transmission. Since voice service may be transmitted over the same facilities as broadband service, there is no way to distinguish between the two in order to ensure that voice (in which the incumbent LECs are dominant carriers) is not provided with broadband in violation of the Telecommunications Act of 1996.

In Paragraph 43 of the NPRM, the Commission inquires "[s]hould an incumbent LECs corporate structure be a relevant consideration for our analysis here?" TCCFUI and Plano suggest that, while an incumbent LECs corporate structure should be a relevant consideration when determining an appropriate model for safeguards applied to incumbent LEC provision of broadband services, the Commission should be aware of certain problems that have arisen for consumers as a result of merger requirements relating to changes in the corporate structure of carriers for broadband services. Merger requirements have created problems for Plano consumers in terms of obtaining the DSL and broadband services that they desire. One specific example arose from GTE's merger with Bell Atlantic. When GTE merged with Bell-Atlantic to form Verizon, the new company was required to spin off its DSL services into a separate company--VADI. When the spin off occurred, Plano residents and City administrators found it impossible not only to locate contact information for VADI in order to inquire about service but also to find out if they were eligible for DSL service. It was City of Plano's experience that even the Verizon representatives had difficulty determining who to contact at VADI to discuss issues and assist customers with obtaining DSL service.

IV. CONCLUSION

TCCFUI and Plano contend that changes to the current regulatory environment through this rulemaking do not meet the statutory intent and purpose of the Telecommunications Act of 1996, will create a barrier to entry into competition, will negatively impact consumers with regard to broadband services and local exchange telephone service, and will not result in increased deployment of broadband services. Therefore, NATOA, TCCFUI, and Plano respectfully request that the current regulatory environment remain in tact and that the Commission instead focus on gaining compliance from the incumbent LECs with the Telecommunications Act of 1996 and the Commission's regulations created and implemented to achieve the intent and purpose of the Telecommunications Act of 1996.

Respectfully submitted,

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ATTACHMENT "A"

BellSouth: A DSL Success Story
By Jim Wagner

Wall Street analysts across the board were pleased at Bell South Corp.'s (NYSE:BLS) announcement Thursday it had met digital subscriber line (DSL) estimates for 2001, netting 405,500 new customers and covering 70 percent of its 63 markets with high-speed capability.

With 620,500 customers, made up of 80 percent residential users and 20 percent business-class services using its 1.5 Mbps asymmetrical DSL (ADSL) offering, BellSouth has proven that DSL is still a viable product for the nation's telecommunications providers and shouldn't be abandoned.

That stands in marked contrast to the other three Baby Bells, Verizon Communications (NYSE:VZ), Qwest Communications (NYSE:Q) and SBC Communications (NYSE:SBC) -- who have either abandoned DSL entirely or significantly slowed their deployment rate in their coverage areas.

What's the secret of BellSouth's success?

According to BellSouth executives, successful self-installs (called virtual truck rolls) and a heavy emphasis on remote terminals are the cause. Remote terminals are mini-central offices (CO) that let telcos extend the range they can provide DSL service, which is limited mainly by distance.

RTs, said Ralph de la Vega, outgoing BellSouth president of broadband and Internet services, played a key role in the company's 188 percent DSL growth rate for the year, a rate higher than any other DSL or cable provider in the nation.

"BellSouth has a make up of customers such that 61 percent are served by central offices and 39 percent out of RTs and we had to get at that 39 percent to be able to hit our target," de la Vega said. "By design, BellSouth, for over a decade now, has been designing the maximum loop length behind RTs to be 12,000 feet so when customers get to that point, they get terrific line speeds."

At 39 percent, RTs substantially expand BellSouth's DSL presence outside of the normal coverage area provided by COs, which reach out 15,000 feet only if there is top-notch copper wiring connected to the consumer's home. De la Vega plans for that number to increase, as the company continues work on RT deployment around its coverage area, which is located in the Southest area of the U.S.

Also helping the Bell's cause is the promotions run in the fourth quarter that gave customers an incentive to sign up for broadband Internet. A free DSL modem (the program ends at the end of the month) and the first month of DSL free helped convince people to upgrade from dial-up or migrate from cable.

BellSouth's success is a lesson the other incumbent should take to heart. For one reason or another, the other three have been slowing down their DSL deployment around the country, a strategy that could backfire.

- SBC has all but given up on Project Pronto, an initiative that was supposed to eventually cover 80 percent of its coverage area throughout the Mid- and Southwest. Executives blame the government for too-stringent regulation that makes expansion too costly to continue.
- Qwest abandoned the DSL market entirely after reporting it would see zero growth in 2002, handing over its high-speed management to the Microsoft Network (NASDAQ:MSFT) and focusing more on business T-1 services.
- Verizon has been slow to embrace an aggressive RT deployment, focusing instead on keeping the customers it has happy, many of which have complained loudly and often of service outages and poor customer service.

De la Vega, who is taking over as president of BellSouth Latin America, is confident BellSouth will continue its RT deployment throughout the U.S., eventually covering 76 percent of the market and resulting in a total of 1.1 million customers by the end of 2002.

BellSouth started the fourth quarter of 2001 on a bit of a bad note. DSL acquisitions (like much of the high-tech industry), either through its own retail offering or that of its affiliate Internet service provider (ISP) or competitive local exchange carrier (CLEC) partners, were lagging in the third -- partly due to the events of Sept. 11.

De la Vega downplayed recent events, saying history shows DSL growth is cyclical in nature; acquisitions are generally slower in the third quarter and pick up in the fourth. He expects the same to happen in 2002.

January 3, 2002

ATTACHMENT "B"

BellSouth Expands DSL Market
Wayne Kawamoto
Managing Editor, Clec-Planet

January 4, 2002 -- BellSouth Corp. (NYSE: BLS) announced that it has nearly tripled its DSL customer base with 620,500 customers in 63 total markets. This marks an increase of 405,500 customers in 2001, which represents a growth rate of 188%.

"As both a DSL wholesaler and retailer, BellSouth has demonstrated its commitment to broadband and continuing our subscriber growth and deployment are testaments to that commitment," said Ralph de la Vega, BellSouth president of broadband and Internet services. "We have led our peers in percent subscriber growth, network deployment and customer service and we anticipate that reaching our 2002 goal of 1.1 million DSL customers will further strengthen that leadership position."

BellSouth claims that its DSL success may be attributed to many factors, most significantly its deployment strategy, self-install initiative and its delivery of a quality product with superior customer service. BellSouth's aggressive, market-driven DSL deployment plan was designed to increase DSL availability. BellSouth DSL is now available to more than 15.5 million lines in its markets.

According to the company, its growth can also be attributed to its deploying DSL in more than 8,600 remote terminals, more than any other DSL provider in the industry. Enabling DSL in remote terminals allows the company to provide broadband to more customers, in many cases eliminating DSL distance limitations.

The company also says that the success of its retail self-install initiative for its residential customers was another critical factor in BellSouth's ability to reach 620,500. Refinements to the self-install kit and the addition in 2001 of self-install options for Mac, Ethernet modem and laptop users have resulted in 96% of BellSouth FastAccess DSL residential customers opting to self-install during recent months. This momentum is expected to continue in 2002 when BellSouth introduces the self-install option for business customers.

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[1] The members of TCCFUI include the following Texas cities: Abernathy, Addison, Alamo, Allen, Andrews, Arlington, Balcones Heights, Belton, Big Spring, Bowie, Breckenridge, Brenham, Brookside Village, Brownfield, Brownwood, Buffalo, Burkburnett, Canyon, Carrollton, Cedar Hill, Center, Cisco, Clear Lake Shores, Cleburne, College Station, Conroe, Corpus Christi, Cottonwood Shores, Crockett, Dallas, Denison, Denton, Dickinson, El Lago, Electra, Fairview, Flower Mound, Fort Worth, Fredericksburg, Friendswood, Georgetown, Grand Prairie, Grapevine, Greenville, Gregory, Groves, Harlingen, Henrietta, Hewitt, Huntsville, Irving, Jacinto City, Jamaica Beach, Kilgore, LaGrange, La Joya, Lampasas, Lancaster, Laredo, League City, Levelland, Lewisville, Longview, Los Fresnos, McAllen, Mexia, Midlothian, Missouri City, Navasota, Nolanville, North Richland Hills, Palacios, Pampa, Paris, Pearsall, Plainview, Plano, Port Neches, Ralls, Refugio, Reno, Richardson, River Oaks, Rosenberg, San Marcos,

San Saba, Selma, Seminole, Seymour, Smithville, Snyder, South Padre Island, Spearman, Stephenville, Sugar Land, Sunset Valley, Taylor Lake Village, Terrell, The Colony, Thompsons, Timpson, Town of Westlake, Trophy Club, Tyler, University Park, Victoria, Waxahachie, and Webster.

[2] The Commission should note that Texas is a state in which right-of-way fees are controlled at the State level (See Chapter 283 of the Texas Local Government Code). Therefore, the state has removed any local government impediments that might arise from right-of-way fees. The main expense for competitive LECs stems from gaining access to an incumbent LECs platform.

[3] Jim Wagner. "BellSouth: A DSL Success Story." ISPNews, 1/3/02 http://www.internetnews.com/isp-news/article/0,,8_948321,00.html (See Attachment "A")

[4] Wayne Kawamoto. "BellSouth Expands DSL Market." CLEC-Planet, 1/4/02 http://www.clec-planet.com/news/01jan2002/04bellsouth.html (See Attachment "B")

[5] "The Telecommunications Act: Consumers Still Waiting for Better Phone & Cable Services on the Sixth Anniversary of National Law." Consumers Union Press Release dated 2/6/02.
<http://www.consumersunion,org/telecom/xithdc202.htm>